



Submission to the Standing
Committee on Justice Policy on
Bill 113, *Police Record Checks
Reform Act, 2015*

5 November 2015



JohnHoward
SOCIETY OF ONTARIO

Centre of Research, Policy & Program Development

John Howard Society of Ontario

111 Peter Street, Suite 603

Toronto ON

M5V 2H1

416-408-4282

www.johnhoward.on.ca

About the John Howard Society of Ontario

The John Howard Society of Ontario (JHSO) is dedicated to creating genuinely safer communities by helping to foster a truly effective criminal justice system. We help achieve this goal in a variety of ways and with a suite of programs and services that we offer through our 19 local offices across Ontario. We provide over 80 different programs and services that help over 100,000 individuals across Ontario annually. Services range from prevention programs for high-risk youth through to housing and reintegration services for those who have been released from prison back into our communities.

Founded in 2003, the Centre of Research, Policy & Program Development (the Centre) is the research and policy arm of JHSO, and is the only organization of its kind in Ontario. It facilitates interdisciplinary innovation by combining partnerships with front-line service providers and creative and academically qualified researchers and analysts. This results in research that *helps people*. The Centre is a leader in non-partisan research, evidence-based programming, and policy development in the justice sector.

Introduction

For over a decade, the John Howard Society of Ontario (JHSO) has been raising concerns about the disclosure of non-conviction information on police record checks.

Routinely, through police record checks, police have disclosed information about non-criminal and non-conviction interactions with Ontarians. Though most do not realize it, simply calling 9-1-1 for help during a mental health crisis can trigger a police report. So too can being stopped and questioned about a robbery in one's neighbourhood. Revealing these non-criminal interactions through requested police record checks has had devastating consequences. People who have not been convicted of any criminal offence may be put in situations where they lose their existing employment, housing and even the custody of their children because of police practices to disclose such information. Indeed, JHSO has heard from numerous legally innocent individuals who have lost employment opportunities or been terminated from existing employment, or who have been rejected from academic programs or placements.

As the demand for police record checks escalates across sectors, a growing number of Ontarians with non-conviction police records face undue exclusion and discrimination. JHSO has researched and documented the harm this practice has inflicted on Ontarians, many of whom are vulnerable and voiceless. Non-conviction records can impact anyone. However, there are specific populations *disproportionately impacted* by police records in Ontario. These populations overlap significantly with communities that already experience significant discrimination, stigma and marginalization: this includes Aboriginal and other racialized communities, as well as individuals with mental health and addiction issues. There are no human rights protections in Ontario for individuals with non-conviction police records – that is, employers can legally deny access to employment or volunteer opportunities based on the presence of a non-conviction record.

In JHSO's recently released report entitled, *Help Wanted*: Reducing Barriers for Ontario's Youth with Police Records*, the hiring practices of a sample of Ontario employers were examined. According to the JHSO's survey of Ontario employers in two counties, 51% of the employers require police background checks of prospective employees during the hiring process. Of these employers who ask for record checks, 15% have a zero tolerance policy and simply exclude all applicants with any police records from employment. While 85% of the employers surveyed indicated that they would be willing to consider hiring someone with a police record, when asked, the majority had never knowingly done so in the past.

In the above report, we also reviewed the academic literature on record checks to identify if there was any compelling evidence to support the use of non-conviction records to screen

prospective employees or volunteers.¹ The heightened demand for police record checks in recent years has been fueled in large part by a desire to protect vulnerable populations from harm and to minimize organizational risk and exposure to liability. It is often taken for granted that police record checks are reliable and useful screening tools. It is worthwhile to consider to what extent police record checks actually predict risk. There is no research demonstrating that police record checks are effective as risk management tools. This is an especially important point to emphasize given that the type of information that can be disclosed on police record checks is highly sensitive and personal, often resulting in the prejudicial and stigmatizing treatment of those with police records. We found no evidence to suggest a link between past non-conviction records and future (criminal) behaviour, particularly in the workplace. In fact, the existing evidence indicates that this is also true of persons with *criminal convictions*.

The research *is* clear that stable employment, as well as the income, housing and social networks that employment can foster, are significant protective factors against criminal offending. Thus what does demonstrably improve community safety is employment and positive community engagement. Excluding a huge proportion of Ontarians – none of whom have been convicted of any crime - from pro-social community engagement is counterproductive to building healthy and safe communities.

Based on the absence of scientific evidence on the predictive validity of non-conviction records, and the widespread negative impacts these records have on Ontarians, we called for change to address the devastating impacts of non-conviction disclosure on police record checks. A critical piece of regulation and standardization we called for was legislation around the *disclosure* of non-conviction information on police record checks.² This is what Bill 113, the *Police Record Checks Reform Act, 2015*, seeks to achieve. Bill 113 represents the culmination of years of research, collaboration, advocacy and leadership among policing, community-based and governmental parties, on the issue of non-conviction information disclosure on police record checks. Building on the excellent framework offered by the Ontario Association of Chiefs of Police's 2014 LEARN Guideline, Bill 113 represents a significant step forward for Ontario.

We support Bill 113 with its much-needed provisions regulating:

- **The levels of record checks** in Ontario, along with the **terminology** used to refer to them;
- The **type of information** disclosed at the different levels of record checks;
- **To whom** the results of a record check should be released; and

¹ For a more in-depth review of the literature on risk predication and criminal records, see our 2014 report, *Help Wanted*: Reducing Barriers for Ontario's Youth with Police Records*.

² JHSO has made a number of other recommendations related to police record checks; some of these recommendations pertain to employer demand for record check products; others relate to (creating) human rights protections for Ontarians with police records. These recommendations remain a priority to our organization, but fall beyond the scope of this particular Bill.

- The opportunity for **reconsideration** of the results of a record check.

All of these above noted areas are important facets of the record check issue that require regulation and standardization; and Bill 113 aims to fill the existing statutory gap.

Defining and Standardizing Police Record Checks

It is imperative to bring consistency and transparency to the language used to describe record checks (as well as to what type of records will be disclosed at these different levels of check). The current variation in police services' practices causes confusion and frustration for both those subject to record checks and the employers/agencies who receive the record check products. For instance, a "criminal record check" can mean something very different depending on the police jurisdiction – even between neighboring police services. Adding to the confusion is the lack of legal clarity around what a "criminal record" actually means. The types of record checks offered by police services should be the same across the province, and it should as clear as possible to applicants consenting to record checks what each level of check will reveal before they submit their application and pay the fee. Many people with non-conviction police records *do not know* that they have police records that can be disclosed on record checks because they (understandably) do not believe that they have a "criminal record." People with past justice system contact (and who may be unsure what is on their record) are often reticent to submit to record checks, as many have been treated poorly and stigmatized in the past. Both defining terminology, and regulating what types of records can be disclosed, would be tremendously helpful in bringing about predictability and clarity.

Currently, the absence of regulation provides police with the discretion to establish what record checks they will offer, and what they will disclose (with a few restrictions). This has translated into significant variation in practices across police services in Ontario, which is not fair for Ontarians with police records, nor is it desirable to employers/agencies. Bill 113 delineates three levels of police record checks: the **criminal record check (CRC)**; the **criminal record and judicial matters check (CRJMC)**; and the **vulnerable sector check (VSC)**. If this legislation passes, all police services will have to offer the same three levels of police record checks, bringing about much needed consistency.

Defining Terms

Non-conviction dispositions:

Records of instances where charges were laid, but the individual was not found guilty/convicted (i.e. charges were stayed, acquitted or withdrawn).

Police contacts: non-criminal interactions with the police that are recorded in police databases (e.g. *Mental Health Act* apprehensions, arrests, being questioned as a suspect, etc.).

What Should Be Disclosed

As articulated in the introduction of this submission, we could not find any compelling evidence to support relying on non-conviction information when screening prospective employees/volunteers. In light of the tremendous negative social, fiscal and human costs associated with their disclosure, it was our recommendation to the provincial government that non-conviction records be presumptively not disclosed at any level of record check. If there are no concrete and statutory limits placed on the disclosure of non-conviction records, actors often err on the side of caution and release more information than may be necessary, so as to mitigate (perceived) organizational liability. This is true on both the releasing side (police) and the requesting side (employers/agencies). Evidence shows that when given discretion, individual actors tend to be more risk averse. Clear legislation that delineates what should and, importantly, what *should not* be disclosed would help mitigate this organizational risk aversion.

JHSO endorses Bill 113's (and the 2014 LEARN Guideline's) approach to the disclosure of non-conviction information on police record checks. We submit that non-criminal police contacts should **never** be disclosed (which is reflected in both Bill 113 and the 2014 LEARN Guideline), and that non-conviction dispositions be presumptively not disclosed on any level of record check. We endorsed the 2014 LEARN Guideline, and support the proposed legislation, as both allow for only the *exceptional disclosure* of non-conviction dispositions and only at the VSC level. There should be a high threshold to justify disclosure of non-conviction dispositions at the VSC level. The 2014 LEARN Guideline crafted appropriately strict criteria, in our view, that would ensure that these disclosures would in fact be very rare and exceptional. In general, consistent with the presumption of innocence and evidence-led practice, non-conviction dispositions should not be disclosed at the VSC (and **never** at the CRC and CRJMC level). The criteria selected by the OACP LEARN Subcommittee were carefully reviewed and crafted with a view to both the social science evidence and the *Criminal Records Act* (and its provisions around vulnerable sector checks). We strongly endorsed the exceptional disclosure assessment tool as defined and outlined in the 2014 LEARN Guideline. It is our understanding that the exceptional disclosure criteria tied to this legislation will be further outlined in regulation, and submit that it should reflect the narrow set of circumstances defined in the 2014 LEARN guideline.

On a final note, police services should be required to offer all levels of record checks, since not all employers/volunteer agencies request or want to know about applicants' pending charges or absolute/conditional discharges (as revealed on the CRJMC level). The CRC option should be available to them. More in-depth types of record checks (CRJMC, VSC) should also not be recommended by police services where employers have only required a CRC of applicants.

Youth Records

Based on recent research conducted by JHSO (detailed in our report [Help Wanted*: Reducing Barriers for Ontario's Youth with Police Records](#)) youth with police records face tremendous

barriers to accessing labour market, volunteer and educational opportunities. In Canada, the law treats youth records differently from adult records, in recognition of the fact that youth, by virtue of their age, should be treated differently than adults, and that they should not be prejudiced for life by a youth record. Unlike adult criminal records, which are in many cases retained in police databases and disclosed indefinitely, there are tight protections around the access to and disclosure of youth records. In fact, under the youth criminal justice legislation in Canada, the *Youth Criminal Justice Act (YCJA)*, it is an offence to communicate the record of a youth to an individual/organization that is not authorized by the YCJA to have access to the youth record.

Police record checks across Ontario routinely disclose youth records that have not yet been sealed (this is allowed under the 2014 LEARN Guideline), and youth in job/volunteer application processes are frequently in the objectionable position of choosing whether to share information about their youth record with an employer or face rejection from the opportunity they are seeking. During the consultations around the crafting of Bill 113, we submitted that the government of Ontario should consider whether the disclosure of youth records is appropriate at *any* level of record check given the spirit and intent of the YCJA. The solution that is proposed in Bill 113 is, in our view, laudable and practical. To our understanding, Bill 113 allows youth to request any level of record check required by employers, while avoiding the problematic disclosure of their youth record(s) to entities not entitled by law to access them. It appears, based on Section 11 of Bill 113 - *Manner of Disclosure, youth records* - that there will be two sheets to record checks where a youth record is involved. The first sheet or record contains the results of the police record check which can be provided to the requesting agency (i.e. which will contain all of the permissible records as outlined in the *Authorized Disclosure Table* **aside from any accessible youth records**), and the second (detachable) sheet is the youth record, which the youth can tear off and keep for him/herself. This will allow individuals the ability to not disclose any open youth records to agencies that do not have lawful access to them. If this process is implemented as stated above, this seems a completely viable solution to an issue that was not really in scope during the LEARN 2014 consultations around non-conviction information, but that remains very much an outstanding issue of concern to JHSO.

Consent

Consistent with best practice around privacy and the very notion of consent, individuals should be provided with the results of their record check first. Having viewed the contents of the record check, individuals can then make an informed decision about whether they want to share it with a prospective employer/agency. Many people who have non-conviction or even youth records may not know what (if any) information may be revealed on their record checks, and therefore should be able to view the record check in order to make an informed decision about whether they want to share this highly personal information or not. They may also want to engage the reconsideration process (described below) before submitting the record check to the requesting agency.

Reconsideration

We fully endorse the requirement contained in Bill 113 mandating that police services have a reconsideration process for record checks where non-conviction dispositions are revealed. If Bill 113 passes, the current volume of requests for reconsideration received by police services who already have reconsideration processes in place should drop dramatically given that the amount of non-conviction records being disclosed (for non-LEARN compliant police services) would be significantly reduced.

Conclusion

We applaud the provincial government's response to community concerns around the disclosure of non-conviction information and the need for standardization and regulation of police record checks. JHSO is in strong support of Bill 113. This proposed legislation signals a tremendous step forward for all Ontarians, who have or could face discrimination, stigmatization and exclusion arising from the release of non-conviction records.